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11 UNITED STATES DISTRICT COURT

12 DISTRICT OF NEW JERSEY

13 ISAAC MIKHAIL and MARLEN MIKHAIL, )

14 on behalf of themselves and all others similarly )

15 situated, )

16 Plaintiffs, )

17 v. )

18 BANK OF AMERICA, N.A. and BAC )

19 HOME LOANS SERVICING, LP. )

20 Defendants. )

No.

**CLASS ACTION**

**COMPLAINT FOR DAMAGES,  
RESTITUTION AND INJUNCTIVE  
RELIEF**

**JURY TRIAL DEMANDED**

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. JURISDICTION.....	5
III. PARTIES.....	5
IV. FACTUAL BACKGROUND .....	6
A. The Foreclosure Crisis.....	6
B. Creation of the Home Affordable Modification Program .....	7
C. Duties of a Participating Servicer Under HAMP .....	8
D. Plaintiffs' Effort to Obtain a Loan Modification Under HAMP .....	14
1. Issac Mikhail and Marlen Mikhail .....	14
E. Class Allegations.....	17
COUNT I BREACH OF CONTRACT / BREACH OF DUTY OF GOOD FAITH and FAIR DEALING .....	20
COUNT II PROMISSORY ESTOPPEL, IN THE ALTERNATIVE.....	22
COUNT III VIOLATIONS OF THE NEW JERSEY Consumer Fraud Act N.J.S.A. 56:8-1 <i>et seq.</i>	22
V. PRAYER FOR RELIEF .....	23
VI. JURY TRIAL DEMANDED .....	24

## I. INTRODUCTION

1  
2           1.       In October 2008, Bank of America accepted \$15 billion in funds from the United  
3 States Government as part of the Troubled Asset Relief Program ("TARP"), 12 U.S.C. § 5211. In  
4 January 2009, in connection with its acquisition of Merrill Lynch, Bank of America accepted  
5 another \$10 billion in TARP funds along with a partial guarantee against losses on \$118 billion in  
6 mortgage-related assets. By accepting this payment, Bank of America agreed that it would  
7 participate in one or more programs that TARP authorized the Secretary of the Treasury to  
8 establish necessary to minimize foreclosures.

9           2.       Consistent with the TARP mandate, the Treasury Department implemented the  
10 Home Affordable Modification Program ("HAMP") – a detailed program designed to stem the  
11 foreclosure crisis by providing affordable mortgage loan modifications and other alternatives to  
12 foreclosure to eligible borrowers. Companies that accepted money under the TARP are subject to  
13 mandatory inclusion in HAMP as are certain classes of loans, namely those held by Federal  
14 National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation  
15 ("Freddie Mac").

16           3.       Bank of America signed a contract with the U.S. Treasury on April 17, 2009  
17 (attached as Exhibit 1 and included by reference) agreeing to comply with the HAMP requirements  
18 and to perform loan modification and other foreclosure prevention services described in the  
19 program guidelines. The guidelines issued by the Treasury Department set forth a detailed process  
20 whereby a participating servicer such as Bank of America, acting through its subsidiary BAC  
21 Home Loans Servicing, must:

- 22                   • identify loans that are subject to modification under the HAMP program, both  
23                   through its own review and in response to requests for modification from  
24                   individual homeowners;
- 25                   • collect financial and other personal information from the homeowners to  
26                   evaluate whether the homeowner is eligible for a loan modification under  
27                   HAMP;

- institute a modified loan with a reduced payment amount as per a mandated formula, that is effective for a three-month trial period for borrowers that are eligible for a modification; and
- provide a permanently modified loan to those homeowners who comply with the requirements during the trial period. Whether the homeowner qualifies for a modification or not, participating servicers are also required to provide written notices to every mortgage borrower that has been evaluated for a loan modification, whether or not the borrower has been found eligible.

4. HAMP and its associated directives also set prohibitions against certain conduct including demanding upfront payments in order to be evaluated for a loan modification, instituting or continuing foreclosures while a borrower is being evaluated for a loan modification, and restrictions on the way a servicer may report the borrower to credit reporting agencies.

5. Though Bank of America accepted \$25 billion in TARP funds and entered into a contract obligating itself to comply with the HAMP directives and to extend loan modifications for the benefit of distressed homeowners, Bank of America has systematically failed to comply with the terms of the HAMP directives and has regularly and repeatedly violated several of its prohibitions.

6. Under HAMP, the federal government incentivizes participating servicers to make adjustments to existing mortgage obligations in order to make the monthly payments more affordable. Servicers receive \$1,000.00 for each HAMP modification, plus an additional \$500.00 incentive fee if the borrower is current but facing imminent default. However, this incentive is countered by a number of financial factors that make it more profitable for a mortgage servicer such as Bank of America to avoid modification and to continue to keep a mortgage in a state of default or distress and to push loans toward foreclosure. This is especially true in cases where the mortgage is owned by a third-party investor and is merely serviced by the servicer such as Bank of America. On information and belief, Bank of America does not own a significant majority of the loans on which it functions as a servicer.

1           7.       Economic factors that discourage Bank of America from meeting its contractual  
2 obligations under HAMP by facilitating loan modifications include the following:<sup>1</sup>

- 3           • Bank of America may be required to repurchase loans from the investor in order  
4 to permanently modify the loan. This presents a substantial cost and loss of  
5 revenue that can be avoided by keeping the loan in a state of temporary  
6 modification or lingering default.
- 7           • The monthly service fee that Bank of America, as the servicer, collects as to  
8 each loan it services in a pool of loans, is calculated as a fixed percentage of the  
9 unpaid principal balance of the loans in the pool. Consequently, modifying a  
10 loan to reduce the principal balance results in a lower monthly fee to the  
11 servicer.
- 12          • Fees that Bank of America charges borrowers that are in default constitute a  
13 significant source of revenue to the servicer. Aside from income Bank of  
14 America directly receives, late fees and “process management fees” are often  
15 added to the principal loan amount thereby increasing the unpaid balance in a  
16 pool of loans and increasing the amount of the servicer’s monthly service fee.
- 17          • Entering into a permanent modification will often delay a servicer’s ability to  
18 recover advances it is required to make to investors of the unpaid principal and  
19 interest payment of a non-performing loan. The servicer’s right to recover  
20 expenses from an investor in a loan modification, rather than a foreclosure, is  
21 often less clear and less generous.
- 22          • Fixed overhead costs involved in successfully performing loan modifications  
23 involve up-front cost to the servicer for additional staffing, physical  
24 infrastructure, and expenses such as property valuation, credit reports and  
25 financing costs.

26  
27 <sup>1</sup> See Thompson, Diane E., *Why Servicers Foreclose When They Should Modify and Other*  
28 *Puzzles of Servicer Behavior*, National Consumer Law Center (October 2009).

1           8.       Rather than allocating adequate resources and working diligently to reduce the  
2 number of loans in danger of default by establishing permanent modifications, Bank of America  
3 has serially strung out, delayed and otherwise hindered the modification processes that it  
4 contractually undertook to facilitate when it accepted billions of dollars from the United States.  
5 Bank of America's delay and obstruction tactics have taken various forms with the common result  
6 that homeowners with loans serviced by Bank of America, who are eligible for permanent loan  
7 modifications, and who have met the requirements for participation in the HAMP program, have  
8 not received permanent loan modifications to which they are entitled.

9           9.       In addition to its obligations based on its contract with the Treasury Department,  
10 Bank of America has entered into written agreements with individual homeowners, including  
11 Plaintiffs, for temporary loan modifications that must be converted to permanent loan  
12 modifications. Plaintiffs and a similar class of borrowers have complied with the agreements by  
13 submitting the documentation asked of them and, when requested, by making payments. Despite  
14 Plaintiffs' efforts, Defendants have ignored their contractual obligation to modify his loans  
15 permanently.

16           10.     Because Bank of America is not meeting its contractual obligations, at least  
17 hundreds, possibly thousands, of New Jersey homeowners are wrongfully being deprived of an  
18 opportunity to cure their delinquencies, pay their mortgage loans and save their homes. By failing  
19 to live up to its obligations under the terms of the agreement it entered into with the Department of  
20 the Treasury, and the terms of the contracts it formed with individual homeowners, Bank of  
21 America has left thousands of borrowers in a state of limbo – often worse off than they were before  
22 they sought a modification from Bank of America. Defendants' actions violate their contractual  
23 obligations, thwart the purpose of HAMP, and are illegal under New Jersey law.

24           11.     Plaintiffs Isaac Mikhail and Marlen Mikhal ("Plaintiffs") bring this suit on behalf of  
25 themselves and a class of similarly situated New Jersey residents (the "Class") to challenge the  
26 failure of Defendant Bank of America Bank, N.A. and its subsidiary, Defendant BAC Home Loans  
27 Servicing, LP (collectively referred to as "Defendants" or "Bank of America") to honor the terms  
28

1 of their agreement with the United States Treasury for the intended benefit of homeowners, their  
 2 failure to honor agreements directly with individual homeowners to modify mortgages to a point  
 3 that they are affordable and sustainable, and to recover costs and losses incurred as a result.

## 4 **II. JURISDICTION**

5 12. This Court has subject matter jurisdiction over this action under 28 U.S.C.  
 6 § 1332(d)(2) in that the matter is a class action wherein the amount in controversy exceeds the sum  
 7 or value of \$5,000,000, exclusive of interest and costs, and members of the Class are citizens of a  
 8 State different from the Defendants.

9 13. This Court also has subject matter jurisdiction over this action under 28 U.S.C.  
 10 §§ 1331 and 1367 in that the Plaintiff and the Class are intended, third-party beneficiaries to a  
 11 contract between Bank of America and the U.S. Treasury that was entered into pursuant to and  
 12 under the direction of TARP. 12 U.S.C. § 5201 *et seq.*

13 14. This Court has personal jurisdiction over the parties in this action by the fact that  
 14 Defendants are corporations that are licensed to do business in the state of New Jersey or otherwise  
 15 conduct business in the state of New Jersey.

16 15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) inasmuch as the  
 17 unlawful practices are alleged to have been committed in this District, Defendants regularly  
 18 conduct business in this District, and the named Plaintiffs reside in this District.

## 19 **III. PARTIES**

20 16. Plaintiffs Isaac Mikhail and Marlen Mikhail are a married couple residing in  
 21 Hawthorne, New Jersey.

22 17. Defendant Bank of America, N.A. is a mortgage lender headquartered in Charlotte,  
 23 NC. Defendant BAC Home Loans Servicing, LP is a subsidiary of Bank of America, N.A..  
 24 Defendants are collectively referred to as "Bank of America" and are currently doing business and  
 25 maintaining office branches throughout the State of New Jersey.



#### IV. FACTUAL BACKGROUND

##### A. The Foreclosure Crisis

18. Over the last three years, the United States has been in a foreclosure crisis. A congressional oversight panel has recently noted that one in eight U.S. mortgages is currently in foreclosure or default.<sup>2</sup>

19. New Jersey has been one of the hardest hit by the housing crisis. New Jersey ranks tenth highest on the state foreclosure list in the United States for all of 2009. The total number of New Jersey properties with foreclosure filings in 2009 was 63,208. This represents a 103% increase from 2007.<sup>3</sup>

20. In the first half of 2010, over 1.65 million properties in the United States received foreclosure notices. The total number of New Jersey properties receiving foreclosure filings in the first half of 2010 totaled 36,542, again putting New Jersey in the top ten highest states for foreclosure filings.<sup>4</sup>

21. Economists predict that interest rate resets on the riskiest of lending products will not reach their zenith until sometime in 2011. See Eric Tymoigne, *Securitization, Deregulation, Economic Stability, and Financial Crisis*, Working Paper No. 573.2 at 9, Figure 30, available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1458413](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1458413) (citing a Credit Suisse study showing monthly mortgage rate resets).

<sup>2</sup> Congressional Oversight Panel, Oct. 9, 2009 report at 3. Available at <http://cop.senate.gov/reports/library/report100909-cop.cfm>.

<sup>3</sup> <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&itemid=8333>

<sup>4</sup> <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&acct=219663&itemid=9555&utm>.



**B. Creation of the Home Affordable Modification Program**

22. Congress passed the Emergency Economic Stabilization Act of 2008 on October 3, 2008 and amended it with the American Recovery and Reinvestment Act of 2009 on February 17, 2009 (together, the “Act”). 12 U.S.C.A § 5201 et seq. (2009).

23. The purpose of the Act is to grant the Secretary of the Treasury the authority to restore liquidity and stability to the financial system, and ensure that such authority is used in a manner that “protects home values” and “preserves homeownership.” *Id.*

24. The Act grants the Secretary of the Treasury the authority to establish the Troubled Asset Relief Program, or TARP. 12 U.S.C. § 5211. Under TARP, the Secretary may purchase or make commitments to purchase troubled assets from financial institutions. *Id.*

25. Congress allocated up to \$700 billion to the United States Department of the Treasury for TARP. 12 U.S.C. § 5225.

26. In exercising its authority to administer TARP, the Act mandates that the Secretary “shall” take into consideration the “need to help families keep their homes and to stabilize communities.” 12 U.S.C. § 5213(3).

27. The Act further mandates, with regard to any assets acquired by the Secretary that are backed by residential real estate, that the Secretary “shall implement a plan that seeks to maximize assistance for homeowners” and use the Secretary’s authority over servicers to encourage them to take advantage of programs to “minimize foreclosures.” 12 U.S.C. § 5219. The Act grants authority to the Secretary of the Treasury to use credit enhancement and loan guarantees to “facilitate loan modifications to prevent avoidable foreclosures.” *Id.*

28. The Act imposes parallel mandates to implement plans to maximize assistance to homeowners and to minimize foreclosures. 12 U.S.C. § 5220.

29. On February 18, 2009, pursuant to their authority under the Act, the Treasury Secretary and the Director of the Federal Housing Finance Agency announced the Making Home Affordable program.

30. The Making Home Affordable program consists of two subprograms. The first subprogram relates to the creation of refinancing products for individuals with minimal or negative equity in their home, and is now known as the Home Affordable Refinance Program, or HARP.

31. The second subprogram relates to the creation and implementation of a uniform loan modification protocol, and is now known as the Home Affordable Modification Program, or HAMP. It is this subprogram that is at issue in this case.

32. HAMP is funded by the federal government, primarily with TARP funds. The Treasury Department has allocated at least \$75 billion to HAMP, of which at least \$50 billion is TARP money.

### **C. Duties of a Participating Servicer Under HAMP**

33. Because Bank of America accepted \$25 billion in federal funds and additional loan guarantees, it was required to participate in HAMP for the loans on which it functions as a loan "servicer." On April 17, 2009, Steve R. Bailey, of Bank of America, N.A., executed a Servicer Participation Agreement ("SPA") with the federal government. A copy of this SPA is attached as Ex. 1.

34. The SPA executed by Mr. Bailey incorporates all "guidelines," "procedures," and "supplemental documentation, instructions, bulletins, frequently asked questions, letters, directives, or other communications," referred to as "Supplemental Directives" issued by the Treasury, Fannie Mae or Freddie Mac in connection with the duties of Participating Servicers. These documents together are known as the "Program Documentation" (SPA I.A.), and are incorporated by reference herein. The SPA mandates that a Participating Servicer "shall perform" the activities described in the Program Documentation "for all mortgage loans it services." SPA I.A., 2.A.<sup>5</sup>

<sup>5</sup> The Program Documentation also includes Supplemental Directive 09-01 ("SD 09-01," attached hereto as Exhibit 2), Home Affordable Modification Program; Base Net Present Value (NPV) Model Specifications ("NPV Overview," attached hereto as Exhibit 3) and Supplemental Documentation-Frequently Asked Questions ("HAMP FAQs," attached hereto as Exhibit 4) and Supplemental Directive 09-08 ("SD 09-08," attached hereto as Exhibit 5). A summary of the guidelines for the Making Home Affordable program are attached hereto as Exhibit 7. These documents together describe the basic activities required under HAMP and are incorporated by reference in both of the TPP Agreements signed by Plaintiff (except for Exhibit 7) as well as herein (including Exhibit 7).

1           35.     The first Supplemental Directive (“SD”) was issued on April 6, 2009, and states that  
2     the national mortgage modification program was “aimed at helping 3 to 4 million at-risk  
3     homeowners – both those who are in default and those who are at imminent risk of default – by  
4     reducing monthly payments to sustainable levels.” Ex. 2 at p. 1. This directive and the directives  
5     to follow were issued to provide guidance for adoption and implementation of HAMP “to provide a  
6     borrower with sustainable monthly payments.” *Id.*

7           36.     The Program Documentation requires Participating Servicers to evaluate *all loans*  
8     which are 60 or more days delinquent or appear to be in imminent default (as defined by the  
9     Program Documentation), to determine which loans meet the HAMP eligibility criteria. *Id.* at p. 4.  
10    In addition, if a borrower contacts a Participating Servicer regarding a HAMP modification, the  
11    Participating Servicer must collect income and hardship information to determine if the borrower is  
12    eligible for a HAMP modification. *Id.* at pp. 3-4.

13          37.     A HAMP Modification consists of two stages. First, a Participating Servicer is  
14    required to gather information and, if appropriate, offer the homeowner a Trial Period Plan  
15    (“TPP”). Second, upon successful completion of the TPP, the Servicer must offer the homeowner  
16    a permanent modification.<sup>6</sup>

17          38.     A mortgage is eligible for the HAMP if criteria enumerated in the Program  
18    Documentation are met. Aside from criteria that require that the loan be a first lien mortgage  
19    originated before 2009, that the property be occupied, and that it be the borrower’s principal  
20    residence, the most salient conditions are that the loan is delinquent or default is reasonably  
21    foreseeable; that the borrower documents a financial hardship (as defined in the Program  
22    Documentation); and that the “borrower has a monthly mortgage payment ratio of greater than 31  
23    percent” of the borrower’s monthly income. *Id.* at p. 2.

24  
25  
26           <sup>6</sup>     The eligibility criteria for HAMP, as well as the formula used to calculate monthly  
27    mortgage payments under the modification, are explained in detail in Exhibit 2. Generally  
28    speaking, the goal of a HAMP modification is for owner-occupants to receive a modification of a  
   first-lien loan by which the monthly mortgage payment is reduced to 31% of their monthly income  
   for the next five years.

1           39.     The servicer must “provide a borrower with clear and understandable written  
2 information about the material terms, costs, and risks of the modified mortgage loan in a timely  
3 manner to enable borrowers to make informed decisions.” *Id.* at p. 13.

4           40.     Once the participating servicer has determined a mortgage borrower’s eligibility in  
5 the HAMP, the Program Directives place duties on the servicer to take specified actions for the  
6 benefit of the eligible homeowner. The servicer must apply the modification steps enumerated in  
7 the Program Documentation, in the stated order of succession until the borrower’s monthly  
8 mortgage payment ratio is reduced to 31 percent of the borrower’s monthly income. These steps  
9 include capitalizing accrued interest and escrow advances, reducing the interest rate, extending the  
10 term and re-amortizing the loan (if necessary), and providing a principal forbearance (if necessary).  
11 *See* Ex. 2 at pp. 8-10; *see also* Ex. 3 at p. 2.

12           41.     After applying the enumerated modification steps to calculate the modified payment  
13 amount, a servicer must offer the borrower a TPP. The TPP consists of a three-month period (four  
14 months for loans that are current, but facing imminent default) in which the homeowner makes  
15 mortgage payments based on the modification formula stated in the Program Documentation.  
16 Bank of America uses a standard form agreement to offer TPPs to eligible homeowners. This  
17 agreement describes the homeowner’s duties and obligations under the plan and promises a  
18 permanent HAMP modification for those homeowners that execute the agreement and fulfill the  
19 documentation and payment requirements.

20           42.     If the homeowner executes the TPP Agreement, complies with all documentation  
21 requirements and makes all three (or four, if default is imminent) TPP monthly payments, the  
22 second stage of the HAMP process is triggered, in which the homeowner must be offered a  
23 permanent modification. The payment amount and interest rate in the modified loan are fixed for  
24 five years and equal to the payment amount and interest rate in the TPP. Thereafter, the rate may  
25 escalate annually by up to one percent until it reaches an interest cap which is the lesser of: (i) the  
26 fully indexed and fully amortizing contract rate or (ii) the Freddie Mac Primary Mortgage market  
27

1 Survey rate for 30-year fixed rate mortgage loans on the date the modification is prepared. Once  
 2 capped, the rate is fixed for the remainder of the term. *See* Ex. 2 at p. 9.

3 43. Subject to minor adjustments that can be made to account for changes in the  
 4 income as documented and verified, HAMP directs that the terms of the Trial Plan  
 5 automatically made permanent upon a homeowners successful completion of the Plan. SD  
 6 09-01 states that “[i]f the borrower complies with the terms and conditions of the Trial  
 7 Period Plan, the loan modification will become effective on the first day of the month  
 8 following the trial period as specified in the Trial Period Plan.” Ex. 2 at p. 18.

9 44. HAMP prohibits a participating servicer from taking several actions including the  
 10 following:

- 11 • Proceeding with a foreclosure sale. Any foreclosure sale must be suspended and no  
 12 new foreclosure action may be initiated during the trial period, and until the  
 13 borrower has been considered and found ineligible for other available foreclosure  
 14 prevention options. *See* Ex. 4 at Q63; *see also* Ex. 2 at p. 14.
- 15 • Requiring a borrower to make an initial contribution payment pending the  
 16 processing of the trial period plan before the plan starts. Ex. 4 at Q. 83.
- 17 • Soliciting borrowers to opt out of consideration for HAMP during the temporary  
 18 review period. Ex. 8 at Q1230-02.
- 19 • Reporting borrowers as delinquent to credit reporting bureaus without explanation.  
 20 For borrowers who are current when they enter a trial period, the servicer should  
 21 report the borrower current but on modified payment if the borrower makes timely  
 22 payments during the trial period. For borrowers who are delinquent when they enter  
 23 the trial period, the servicer should report in such a manner that accurately reflects  
 24 the borrower’s current workout status. Ex. 2 at p. 22.
- 25 • Assessing prepayment penalties for full or partial prepayment as part of the  
 26 modification. Ex. 4 at Q. 25.

45. The HAMP requires a participating servicer to send a Borrower Notice to every borrower that has been evaluated for HAMP but is not offered a Trial Period Plan, is not offered an official HAMP modification, or is at risk of losing eligibility for HAMP because they have failed to provide required financial documentation. Ex. 5 at p. 1.

46. The HAMP presumes that final modifications will be extended and finalized upon completion of a TPP or shortly thereafter. HAMP Supplemental Documentation dated December 22, 2009 addresses situations in which the borrower has completed the TPP but has not yet received a permanent modification.

In situations where an eligible borrower successfully completed the trial period and should have been converted to a permanent modification, but for reasons beyond their control were not timely evaluated for a permanent modification, the servicer must promptly make a determination as to whether the borrower is eligible for a permanent HAMP modification. If the borrower is eligible, then the servicer must offer the borrower a permanent HAMP modification as soon as possible, but in no event later than sixty days after discovering the error.

Ex. 8 at Q1222-01.

47. By entering into the SPA, Bank of America covenanted that all services will be performed in compliance with all applicable Federal, state and local laws, specifically including state laws designed to prevent unfair, discriminatory or predatory lending practices. Ex. 1 at ¶ 5(b).

48. Under the SPA, Bank of America also covenanted that it would perform the services required under the Program Documentation and the Agreement in accordance with the practices, high professional standards of care, and degree of attention used in a well managed operation, and no less than that which Bank of America exercises for itself under similar circumstances, and that Bank of America would use qualified individuals with suitable training, education, experience and skills to perform the Services. *Id.* at ¶ 5(d).

49. Bank of America has routinely failed to meet its obligations under the SPA and the Program Directives. Mortgage borrowers who request to be evaluated for a modification under HAMP routinely face unexplained delays and go weeks or months with no communication from Bank of America after providing the requested information. Borrowers who attempt to contact



1 Bank of America by telephone face long periods of time on hold and are transferred between  
2 service representatives in a deliberate effort to cause the borrower to give up and to terminate the  
3 call. Bank of America regularly falsely informs borrowers that it did not receive requested  
4 information and demands that documents be re-sent.

5 50. Bank of America has routinely failed to live up to its end of the TPP Agreement and  
6 offer permanent modifications to homeowners. In January 2010, the U.S. Treasury reported that  
7 Bank of America had 1,066,025 HAMP-eligible loans in its portfolio. Trial periods have been  
8 started on only 237,766 of these loans. Of those, just 12,761 resulted in permanent modifications  
9 (only 5% of the started Trial modifications and just over 1% of the eligible pool) even though  
10 many more homeowners had made the payments and submitted the documentation required by the  
11 TPP Agreement. The January 2010 Treasury Report is attached hereto as Exhibit 6.

12 51. In June 2010, based on figures provided by Bank of America, the Treasury  
13 Department revised its figure regarding potential HAMP-eligible loans in Bank of America's  
14 portfolio down to 478,811. The Treasury Department reported that Bank of America completed  
15 only 62,969 permanent modifications.<sup>7</sup> Even with the number of HAMP eligible loans more than  
16 halved from the January 2010 report, Bank of America has provided permanent modifications to  
17 only 13% of its eligible pool – which is among the worst performance of any major servicer. The  
18 May 2010 Treasury Report is attached hereto as Exhibit 9.

19 52. By failing to live up to the TPP Agreement and convert TPPs into permanent  
20 modifications, Bank of America is leaving homeowners in limbo, wondering if their home can be  
21 saved and preventing homeowners from pursuing other avenues of resolution, including using the  
22 money they are putting toward TPP payments to fund bankruptcy plans, relocation costs, short  
23 sales or other means of curing their default.

24  
25  
26 <sup>7</sup> Bank of America reported that it had completed over 70,000 permanent modifications through  
27 May 27, 2010. The Treasury Department, however, reported that Bank of America completed only  
28 62,969, a discrepancy which Bank of America attributed to an uploading error. No other servicers  
reported problems uploading their information for Treasury's May 2010 report.



**D. Plaintiffs' Effort to Obtain a Loan Modification Under HAMP**

**1. Issac Mikhail and Marlen Mikhail**

53. Plaintiffs Issac Mikhail and Marlen Mikhail purchased their home in 2001 in which they live with their two children and Mr. Mikhail's mother. The mortgage loan and title to the property is in both Mr. Mikhail and Mrs. Mikhail's names. In 2005, the Mikhail's refinanced their mortgage to a 20-year term which was transferred to Bank of America via Countywide Mortgage. The Mikhail's mortgage payment, which was always paid on time, was \$1,857.30 due each month, excluding taxes.

54. Mrs. Mikhail works for TD Bank as a Customer Service Representative. Mr. Mikhail was a store manager at a Thomasville Furniture Store.

55. In June 2007, Mr. Mikhail was injured but returned to work within two weeks. In July 2008, a relapse of his injury forced Mr. Mikhail to have surgery. Mr. Mikhail was determined fully disabled in December 2008, requiring him to live off disability benefits of \$1,612.00 per month, a dramatic reduction in the family income.

56. In late August 2009, Mr. Mikhail called Bank of America and requested that it modify the Mikhail's mortgage. Mr. Mikhail was at this time informed that he would shortly be receiving a package from Bank of America in the mail.

57. Mr. Mikhail repeatedly called Bank of America and was finally able to garner a phone interview on or about September 7, 2009, when he spoke with a representative named Ken Austin. The interview mostly involved Mr. Austin asking Mr. Mikhail about his and his wife's monthly expenses.

58. Mr. Mikhail had another phone interview with Bank of America on September 14, 2009, this time with a representative named Chris Conry. As with the first phone interview, this phone interview mostly involved Mr. Conry asking Mr. Mikhail about his and his wife's monthly expenses.

59. By letter dated November 20, 2009, the Mikhail's were informed by Bank of America that they would be accepted into a TPP. The Mikhail's received this letter via Federal

Express on December 1, 2009. The letter informed the Mikhail's that they were approved for a new four month trial period with a monthly payment of \$1,238.54. The letter also stated that if the Mikhail's were compliant with the trial period requirements, their loan would be permanently modified at a reduced rate. Specifically, the letter stated, in part:

You let us know that it is becoming increasingly difficult for you to make your mortgage payment. We want to help you stay in your home. Under the federal government's Home Affordable Mortgage Program, we may be able to provide you a more affordable mortgage.

Instead of making your existing mortgage payment, you will now make the new four-month trial period mortgage payment of \$1,238.54.. [sic]

**After making your first month's trial period payment, you must return the requested documents and enclosed forms** so we can confirm your eligibility for the trial period plan. ... You will need to send the following information:

- Signed Mortgage Servicer copies of the **Home Affordable Modification Trial Period Plan**.
- The **Hardship Affidavit** completed and signed by each borrower.
- A completed, signed and dated copy of the most **recent tax return** for each borrower.
- The **Freddie Mac Form 1126**, where you provide your financial information.
- **Documentation to verify** all of the **income** of each borrower – exact required documentation is found on the enclosed checklist.

**There are no fees associated with this program ....**

Letter from Matt Skoglund, Senior Vice President, National Servicing Executive, BAC Home Loans Servicing, LP to Isaac and Marlen Mikhail, dated Nov. 20, 2009, attached hereto as Exhibit 10 (emphasis in original).

60. Enclosed with the letter was a Home Affordable Trial Period Plan that set forth terms consistent with the letter. This document opens by stating:

If I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 continue to be true in all material respects, then the Servicer will provide me with a Home Affordable Modification Agreement ("Modification Agreement"), as set forth in Section 3, that would amend and

1 supplement (1) the Mortgage on the Property, and (2) the Note secured by the  
2 Mortgage.

3 *Id.*

4 61. The Mikhails made all the payments itemized in the Trial Period Plan in full and on  
5 time. The representations they made in Section 1 of the Trial Period Plan remained true in all  
6 material respects.

7 62. The Mikhails provided Bank of America with all documents it requested.

8 63. After fully complying with the terms of the Trial Period Plan, and having heard  
9 nothing more, Mr. Mikhail called Bank of America. Its representative, David Corey, confirmed  
10 that the Mikhail's were compliant and Mr. Mikhail confirmed that he would continue making  
11 payments under the TPP.

12 64. Throughout May and June, 2010, Mr. Mikhail again called Bank of America several  
13 times. Invariably he spent long periods on hold and was transferred multiple times during each  
14 call. On multiple occasions, Bank of America representatives informed Mr. Mikhail that Bank of  
15 America would require him to send copies of documents he had previously sent. For example, Mr.  
16 Mikhail was required to submit the same copy of his tax return and Social Security benefit letter no  
17 fewer than three separate times. Mr. Mikhail submitted all documents requested of him with each  
18 request. On at least three occasions, a Bank of America representative confirmed that Bank of  
19 America had received all required documents.

20 65. On July 9, 2010, the Mikhail's received a letter notifying them that Bank of  
21 America had rejected their request for loan modification due to the Mikhail's failure to provide  
22 requested documentation. Specifically, the letter stated:

23 We have reviewed your request for a loan modification under the  
24 federal government's Home Affordable Modification Program.  
25 Unfortunately, your loan is not eligible for a Home Affordable  
26 Modification for the reason stated below.

27 \* \* \*

28 **Request Incomplete.** Your loan is not eligible for a Home  
Affordable Modification because you did not provide us with the  
documents we requested. A notice which listed the specific  
documents we needed and the time frame required to provide them

1 was sent to you more than 30 days ago. We have have also sent you  
2 additional notices about missing or incomplete required documents.

3 We strongly encourage you to continue making the normal monthly  
4 payments under your original loan documents to help avoid  
5 foreclosure.

6 Letter from BAC Home Loans Servicing, LP to Isaac and Marlen Mikhail, dated July 9, 2010  
(emphasis in original), a copy of which is attached hereto as Exhibit 11.

7 66. Despite compliance with all of Bank of America's instructions, and all  
8 responsibilities under the terms of the HAMP directives, the Mikahil's were not provided a Loan  
9 Modification Agreement under the HAMP guidelines.

10 67. The Mikhail's have spent significant time in efforts to modify this loan with Bank of  
11 America including but not limited to dozens of hours on the telephone.

12 68. Despite compliance with all of Bank of America's instructions, and all  
13 responsibilities under the terms of the HAMP directives, the Mikhail's are now required to make  
14 monthly mortgage payments under the original terms of their loan, approximately \$620 more per  
15 month than under the TPP. Nevertheless, because of the Mikhail's financial difficulties, after the  
16 rejection of their HAMP application, the Mikhail's continued to make a mortgage payment under  
17 the terms of their TPP.

18 69. Despite full compliance with the Trial Period Plan and all of Bank of America's  
19 instructions, Bank of America has made derogatory reports regarding the Mikhails to credit  
20 reporting agencies thereby damaging their credit.

21 70. Like hundreds or even thousands of New Jersey residents, the Mikhails have been  
22 living in limbo, without any assurances that their home will not be foreclosed, despite compliance  
23 with HAMP requirements and continued monthly payments under the agreement dictated by Bank  
24 of America. They have invested his limited resources in modified payments based on the promise  
25 that doing so would result in a permanent loan modification.

26 **E. Class Allegations**

27 71. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

1           72.     Plaintiffs bring this action under Rule 23 of the Federal Rules of Civil Procedure, on  
2     behalf of themselves and a Class consisting of:

3           All New Jersey homeowners whose loans have been serviced by one  
4           or both Defendants and who, since April 13, 2009, have requested or  
5           been otherwise eligible for a TPP under the terms of HAMP Program  
6           Documentation and whose loan Bank of America has not  
7           permanently modified either because Bank of America has not  
8           offered them a TPP, because they did not receive a permanent loan  
9           modification after they complied with their obligations under HAMP  
10          as conveyed to them by Bank of America, or because Bank of  
11          America has not honored the terms of a permanent modification  
12          agreement.

13           73.     Excluded from the Class are governmental entities, Defendants, their affiliates and  
14     subsidiaries, Defendants' current or former officers, directors, agents, representatives, their family  
15     members, Defendants' current employees, the members of this Court and its staff.

16           74.     Plaintiffs do not know the exact size or identities of the members of the proposed  
17     class, since such information is in the exclusive control of Defendants. Plaintiffs believe that the  
18     Class encompasses many hundreds and perhaps thousands of individuals whose identities can be  
19     readily ascertained from Defendants' books and records. Therefore, the proposed Class is so  
20     numerous that joinder of all members is impracticable.

21           75.     Based on the size of the modifications at issue, Plaintiffs believe the amount in  
22     controversy exceeds \$5 million.

23           76.     All members of the Class have been subject to and affected by the same conduct.  
24     The claims are based on the terms of a single unifying contract between Bank of America and  
25     Fannie Mae, acting as agent for the United States Treasury, and on form contracts and uniform loan  
26     modification processing requirements. There are questions of law and fact that are common to the  
27     Class, and predominate over any questions affecting only individual members of the Class. These  
28     questions include, but are not limited to the following:

- a.     The nature, scope and operation of Bank of America's obligations to  
        homeowners under HAMP;
- b.     Whether Bank of America breached its duties under HAMP that were  
        intended for the benefit of Class members;

- c. Whether the manner in which Bank of America has executed the duties it undertook as part of the HAMP program violates its duty of good faith and fair dealing;
- d. Whether Bank of America's receipt of an executed TPP Agreement, along with supporting documentation and three monthly payments, creates a binding contract or otherwise legally obligates Bank of America to offer Class members a permanent HAMP modification;
- e. Whether Bank of America's failure to provide permanent HAMP modifications in these circumstances amounts to a breach of contract and/or a breach of the covenant of good faith and fair dealing;
- f. Whether Bank of America demanded and collected initial payments from eligible homeowners in violation of HAMP provisions;
- g. Whether Bank of America's written representations to homeowners stating that they would receive permanent loan modifications upon successful completion of the trial period and then failing to deliver such permanent modification constitutes an unfair or deceptive practice under the New Jersey Consumer Fraud Act ("CFA");
- j. Whether the above practices caused Class members to suffer injury; and
- k. The proper measure of damages and the appropriate injunctive relief.

77. The claims of the individual named Plaintiffs are typical of the claims of the Class and do not conflict with the interests of any other members of the Class in that both the Plaintiffs and the other members of the Class were subject to the same conduct, were subject to the terms of the same agreement and were met with the same absence of a permanent modification.

78. The individual named Plaintiffs will fairly and adequately represent the interests of the Class. He is committed to the vigorous prosecution of the Class's claims and has retained attorneys who are qualified to pursue this litigation and have experience in class actions – in particular, consumer protection actions.







1           90.     Alternatively, Plaintiffs' return of the Agreement constitutes an offer. Acceptance  
2 of this offer occurred when Bank of America accepted Plaintiffs' TPP payments.

3           91.     Plaintiffs' TPP payments to Bank of America constitute consideration. By making  
4 those payments, Plaintiffs gave up the ability to pursue other means of saving their home.

5           92.     Plaintiffs and Bank of America thereby formed a valid contract.

6           93.     To the extent that the contract was subject to a condition subsequently providing  
7 Bank of America an opportunity to review the documentation submitted by Plaintiffs when they  
8 returned the signed TPP, this condition was waived by Bank of America and/or it is estopped to  
9 assert it as a defense to Plaintiffs' claims.

10          94.     By failing to offer Plaintiffs a permanent HAMP modification, Bank of America  
11 breached that contract.

12          95.     Bank of America routinely and regularly breached its duties under both the SPA and  
13 their contract with the individual Plaintiffs by failing to retain, employ, and supervise adequately  
14 trained staff; instituting and/or continuing with foreclosure proceedings against borrowers in a trial  
15 program; and by deliberately acting to delay and otherwise frustrate loan modification processes;  
16 routinely demanding information already in its files; making inaccurate calculations and  
17 determinations of Plaintiffs' eligibility for HAMP; and failing to follow through on oral, written  
18 and implied promises.

19          96.     Plaintiffs remain ready, willing and able to perform under the contracts by  
20 continuing to make TPP payments and provide documentation.

21          97.     Plaintiffs have suffered harm and are threatened with additional harm from Bank of  
22 America's breach. By making TPP payments both during and after the TPP period, Plaintiffs  
23 foregoed other remedies that might be pursued to save their homes, such as restructuring their debt  
24 under the bankruptcy code, or pursuing other strategies to deal with their default, such as selling  
25 their home. On information and belief, some putative Class members have suffered additional  
26 harm in the form of foreclosure activity against their homes.

**COUNT II**

**PROMISSORY ESTOPPEL, IN THE ALTERNATIVE**

98. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

99. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Class described above.

100. Bank of America, by way of its TPP Agreements, made a representation to Plaintiffs that if they returned the TPP Agreement executed and with supporting documentation, and made his TPP payments, they would receive a permanent HAMP modification.

101. Bank of America's TPP Agreement was intended to induce Plaintiffs to rely on it and make monthly TPP payments.

102. Plaintiffs did indeed rely on Bank of America's representation, by submitting TPP payments.

103. Given the language in the TPP Agreement, Plaintiffs' reliance was reasonable.

104. Plaintiffs' reliance was to their detriment. Plaintiffs have yet to receive permanent HAMP modifications and have lost the opportunity to fund other strategies to deal with his default and avoid foreclosure.

**COUNT III**

**VIOLATIONS OF THE NEW JERSEY CONSUMER FRAUD  
ACT N.J.S.A. 56:8-1 ET SEQ.**

105. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

106. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Class described above.

107. Plaintiffs, Class members and defendants are "persons" within the meaning of the CFA.

108. At all relevant times material hereto, defendants conducted trade and commerce in New Jersey within the meaning of the CFA.

110. Bank of America's conduct as set forth herein has been unfair in violation of the CFA because the acts or practices violate established public policy, and because the harm they cause to consumers in New Jersey greatly outweighs any benefits associated with those practices.

## V. PRAYER FOR RELIEF

A. Certify this case as a class action and appoint the named Plaintiffs to be Class representatives and their counsel to be Class counsel;

C. Grant a permanent or final injunction enjoining Bank of America's agents and employees, affiliates and subsidiaries from continuing to harm Plaintiffs and the members of the Class;

E. Order specific performance of Bank of America's contractual obligations together with other relief required by contract and law;

